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SUPREME COURT OF THE UNITED STATES.

Missville
OCTOBER TERM, 1942.

MARY ELLEN UNDERWOOD, Adminis-
tratrix of the Estate of EMMETT G.
UNDERWOOD, Deceased,
Respondent,

vs.

LOUISVILLE AND NASHVILLE RAIL-
ROAD COMPANY, a Corporation,
Petitioner.

No. . **6.13**

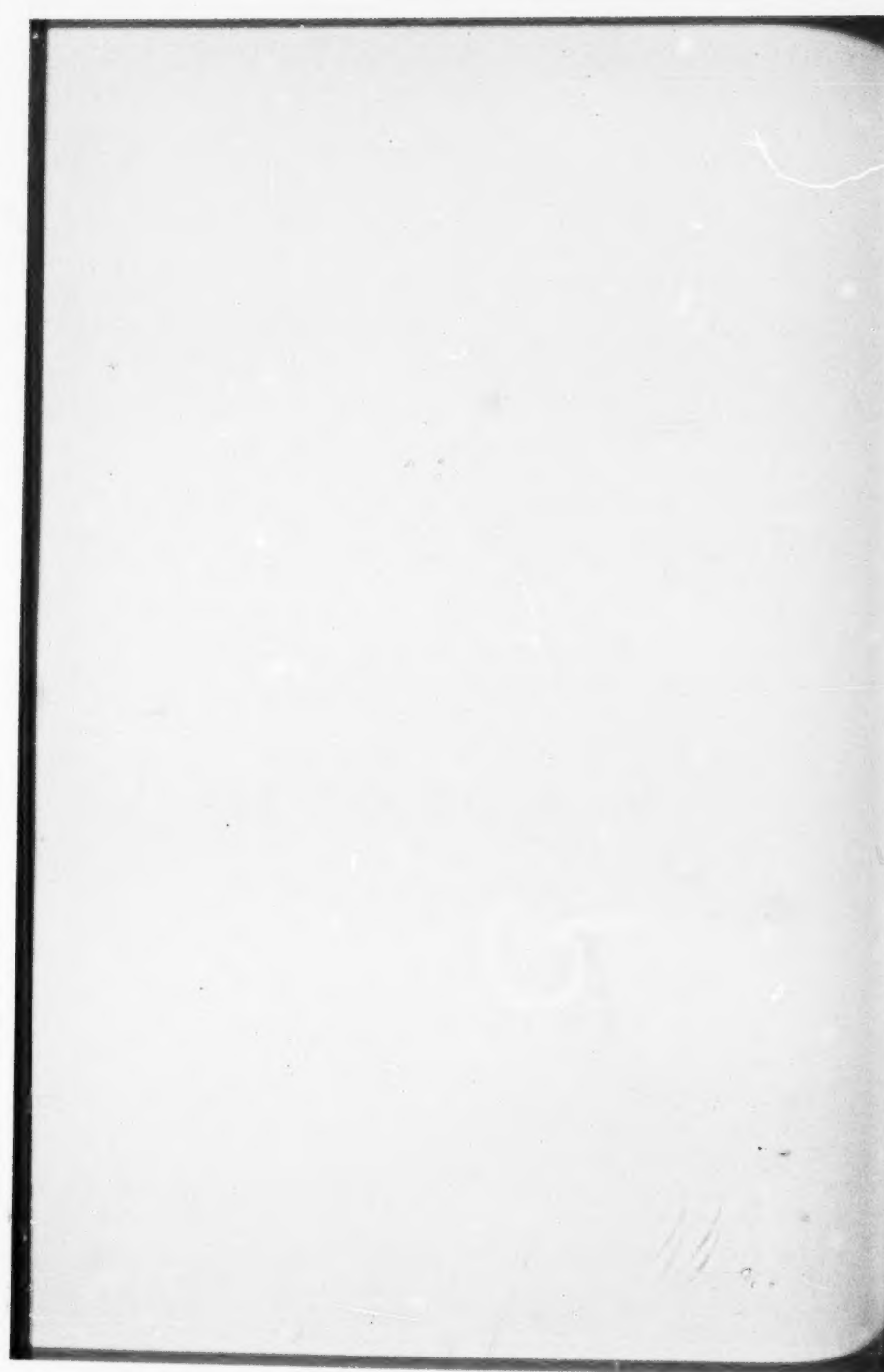
PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the
Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

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LOUISVILLE AND NASHVILLE RAIL-
ROAD COMPANY, a Corporation,
Petitioner.

No.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

The petition of the Louisville and Nashville Railroad
Company respectfully shows to this Honorable Court that:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by respondent Mary Ellen Underwood as administratrix of the estate of her husband, Emmett G. Underwood, against the petitioner, the Louisville and Nashville Railroad Company, in the District Court of the United States for the Eastern District of Illinois, under the provisions of the Federal Employers Liability Act (45 U. S. C. A., Sec. 51), to recover damages for the alleged wrongful death of her husband, resulting from

injuries sustained by him while in the employ of petitioner as a brakeman on one of its freight trains, claiming that the injury and resulting death were proximately caused by the negligence of the engineer and fireman on said train, in

10k) The engineer failing to keep a lookout or to observe that the cut of cars being switched were being moved onto the wrong track (R. 9);

10m) The engineer being negligent in continuing to move the cut without receiving a signal from Underwood and continuing the movement without being able to see or receive a signal from Underwood (R. 10);

10n) The fireman, while in a position to see that the cut was being moved upon the wrong track, negligently failed to give a stop signal to the engineer (R. 10);

10c) The engineer continuing to move the cut of cars and failing to stop the cut when the signals for controlling the movement were lost to view, contrary to the provisions of petitioner's Rule 1011 (R. 5).

Issues were not tendered on the questions of employment, interstate commerce, earnings of the decedent, or that death resulted from the injuries sustained by Underwood, such having been admitted in the pleadings or by stipulations of facts.

The trial upon the above charges of negligence resulted in a verdict and judgment in favor of respondent and against petitioner. The trial court refused to grant the peremptory instructions tendered by petitioner, or to enter judgment notwithstanding the verdict, the tendering of the peremptory instructions and the motion for judgment notwithstanding the verdict being advanced by petitioner upon the proposition that no evidence had been adduced by respondent justifying submission of the case to the jury. No formal opinions were rendered thereon by the

trial court (R. 188). From such refusal and the judgment of the trial court petitioner appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed the judgment below, its opinion appearing on pages 206 to 209, inclusive, of the printed record.

Application for rehearing was denied by said Circuit Court of Appeals on November 27, 1942 (R. 214). On motion by petitioner for a stay of mandate, such was granted on December 3, 1943, staying mandate for thirty days from said date for the purpose of enabling petitioner to file this petition for writ of certiorari (R. 216).

The duly certified record, including all of the proceedings in the trial court and in the Circuit Court of Appeals, together with the printed copies thereof, are being filed herewith under separate cover.

THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon a) Section 240 of the Judicial Code as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347, providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause in a Circuit Court of Appeals.

b) The Federal Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U. S. C. A., Sec. 51.

CASES ADVANCED TO SUSTAIN JURISDICTION.

Southern Railway Company v. Gray, 241 U. S. 333,
36 S. Ct. 558;

Seaboard Air Line R. Co. v. Horton, 223 U. S. 492,
34 S. Ct. 635;

Great Northern R. Co. v. Wiles, 240 U. S. 444, 36
S. Ct. 406.

QUESTIONS PRESENTED.

The question presented by this petition for writ of certiorari is: Did the evidence adduced by respondent justify submission to a jury of the issues whether or not petitioner was guilty of negligence alleged by the respondent in the following instances:

1. That the engineer on petitioner's train was negligent in failing to keep a lookout or to observe that the cut of cars being switched were being moved onto the wrong track by virtue of the decedent Underwood having thrown the wrong switch;

2. That the engineer was negligent in continuing to move the cut without receiving a signal from Underwood, and continuing the movement without being able to see or receive a signal from Underwood;

3. That the fireman, while in a position to see that the cut was being moved upon the wrong track, negligently failed to give a stop signal to the engineer;

4. That the engineer continued to move the cut of cars and failed to stop the cut when the signals for controlling the movement were lost to view, contrary to the provisions of operating rule 1011 of petitioner,

and whether or not any or either of said acts of negligence as charged was the proximate cause of the injury and resulting death of respondent's intestate.

STATUTES INVOLVED.

By the Federal Employers' Liability Act (Act of April 22, 1908, Chapter 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A., Sec 51) the Congress exercised the power granted by the United States Constitution, Article I, Section 8, to regulate the subject of the rights and liabilities of employers and employes of railroad carriers arising upon an employe being injured while engaged in interstate commerce.

Section 240 of the Judicial Code, as amended, Title 28, U. S. C. A., Sec. 347, provides for review by this Court of decisions of the Circuit Court of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Respondent's decedent, Emmett G. Underwood, was employed as a brakeman on one of petitioner's freight trains on the night of June 28, 1939. On reaching the Town of Cullman, Alabama, the engine was being operated by Holmes as engineer, Haines as fireman, Underwood was head brakeman and Phillips was conductor, the other brakeman not entering into the circumstances surrounding the incident in question.

The movements immediately prior to Underwood receiving his injury were concerned with the intention to place a car upon a certain track. In order to better illustrate the movement and circumstances in the yard, petitioner prepared and had received in evidence, a plat of that part of the yard in question (R. 185). A photograph of that part of the yard appears on page 179 of the record, having been submitted by respondent. Starting in the center of the plat, at the bottom edge, and moving upward, the tracks are identified as the southbound main, northbound main, house track No. 2, house track No. 1, pocket track No. 1, pocket track No. 2, and lastly, the wagon track. The connecting track, running almost due north and connecting the northbound main with house tracks Nos. 2 and 1, is called the drill or lead track. There are certain switches marked on the plat which controlled the various movements of the eut of cars. Switch "M," or No. 52, at station 22+50 permitted entrance to the drill from the northbound main track. In its normal position this switch was set against entrance to the drill track. Switch 2, or No. 53, at station 20+74 controlled entrance from the drill into house track No. 2. This switch in its normal position was set for entrance into house track No. 2, acting therefore as a derail for the protection of the northbound main, and in order to allow movement from the northbound main to a

point on the drill beyond switch 2 it had to be thrown. Switch 1, or No. 52, at station 19+76 controlled entrance into house track No. 1, and normally was set against such entrance. It required no attention, therefore, for movement on the drill beyond it. Switch 3, or No. 50, at station 18+98 controlled entrance into pocket tracks 1 and 2, and was normally set against such entrance. In order to proceed beyond it on the drill track it required no attention. Switch 48, at station 17+74 controlled movements into the wagon track, was normally set against such entrance and needed no attention to pass it on the drill track.

The train was proceeding northwardly on the northbound main; beyond the right or south end of the plat is a street crossing, to the south of which the train was stopped. The cutting of the train, lining of the switches and spotting of the cars was the work of the fireman and the head brakeman, the conductor and rear brakeman being at the extreme other end of the long train. It was the purpose of the crew to spot the fourth car in the train along the covered platform on house track No. 1. Haines, the fireman, walked back to the fourth car and cut it off from the rest of the train. Underwood walked northwardly on the northbound main, in the light of the headlight of the engine, and followed by the engine and cut of cars, Haines riding at the rear end of the fourth car. Underwood threw switch 52, or "M," to permit entrance into the drill track. Walking on the west side of the drill track, because the switch stands were placed on that side, Underwood passed without throwing switch 2 for the reason that it needed no attention. Some time or place between switch 2 and switch 1 the engine passed up Underwood, he being thereafter not in the view of the engineer. Underwood should have stopped at switch 1, and after the cut had cleared the point, to have thrown the switch so as to permit backing up into house track No. 1. Instead, Underwood walked past switch 1 and stopped at switch 3. As the cut moved northwardly on the drill track the engi-

neer was waiting for a stop signal from Haines, who was riding on the east side of the rear end of the cut, who did transmit to the engineer a stop signal received from Underwood, who was standing at a switch stand, in reality No. 3, but which should have been No. 1.

After the cut cleared the point Underwood threw the switch, told Haines, "All right, back him up" (R. 34), and proceeded to climb up the side of the car to get to the top of the car for the purpose of giving a stop signal and to set the brakes.

The cut, instead of proceeding into house track 1, where it was intended to go, did, because Underwood threw the wrong switch, move into pocket track No. 1, where the car on which Underwood was was pushed over the bumping posts and ran under the roof of the covered platform, knocking out the supports and causing the roof to fall upon the car and crushing Underwood. From the injuries there sustained Underwood died two or three days later.

The fireman got off the car when it stopped at switch No. 3, and since he had to cut off the spotted car after it was spotted, started to walk down towards the platform (R. 34). At the time the cut stopped moving when it had pushed the fourth car under the covered platform, the engine was about even with him. The engineer states that he had not yet passed the fireman (R. 100). During the time of the back-up movement the engineer testified that he could see to the top of the last car, but at no time saw Underwood or a light there, and stated that at no time had he received a signal to stop from Underwood or anyone else. The fireman testified that he did not know that the wrong switch was thrown, inasmuch as he was riding on the car on the side opposite to that of the switch stands, there being no lights on the stands or in the yard. The only light for illuminating purposes was the headlight of the engine, burning brightly, in the glare of which Underwood walked along the drill track, throwing the switches. The engineer testified that he was on the opposite side of

the track from the switch stands, could not tell which switch he finally passed, and relied on the signal of Underwood, transmitted through Haines, as to when to stop the cut of cars prior to backing up.

Haines and Underwood divided their duties on this movement by agreement. Had the duties been reversed and performed according to the usual manner, Underwood would have transmitted to the engineer the signal to back up, received by him from the fireman, who would have thrown the switch, and then proceeded to the platform, where he would have signaled to the engineer to stop the cut. Inasmuch as their positions were reversed, Underwood was on the side of the track opposite to that of the platform and therefore, instead of going to the platform to signal the spot, went to the top of the car so to do.

Underwood, although a brakeman with a number of years of experience on the L. & N., was new on that run, and the night previous when a car was spotted on the same track was the only time that he had worked in the Cullman yards. Both the engineer and the conductor explained the movements to Underwood, the location of the switches and the position of the tracks. Both illustrated their points by sketches of the yards. The conductor also warned Underwood not to go on top of the cars being switched into the pocket, being the term applied to the "U" formed by the two jaws of the uncovered platform in which ended the two pocket tracks, and also that the platform and covered platform would not clear a man riding on the east side of a car on house track 1. Underwood stated to both that he understood the situation and would take care of himself.

There was a complete absence of any evidence on the part of the respondent that a signal of any kind to stop the cut was given by Underwood after it started on the southward movement, and petitioner claims that there was no evidence adduced by respondent which justified the

submission of this cause to the jury in the trial court upon any of the issues joined therein. Of the various charges of negligence made by respondent, the cause over the objection of petitioner was submitted to the jury on the charges outlined above and contained in paragraphs 10-c, k, m and n, respectively, of the complaint, shown in the printed record at pages 5, 9 and 10.

Petitioner maintains that upon the record in this cause it was the duty of the trial court to have granted the peremptory instructions tendered by it, to have further granted petitioner's motion for judgment notwithstanding the verdict, in accordance with prior decisions of this Court, which rights are given to petitioner by the Federal Employers' Liability Act, and to that end, and to the end, too, that right and justice may prevail in this cause, this Honorable Court's writ of certiorari should issue herein.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to the end that its decision and judgment in said cause of Mary Ellen Underwood, Administratrix of the Estate of Emmett G. Underwood, Deceased, v. The Louisville and Nashville Railroad Company, be reviewed by this Court, as provided by law, and that upon such review said judgment be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

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